IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WHALEN WENRICH,	:	
VICKY L. WENRICH and	:	CIVIL ACTION
MATTEA M. WENRICH,	:	NO. 00-2588
Plaintiffs,	:	
	:	
v.	:	
	:	
ROBERT E. COLE, P.C. and	:	
ROBERT E. COLE,	:	
Defendants.	:	

M E M O R A N D U M

Padova, J. December , 2000

Plaintiffs have brought this action alleging violations of the Fair Debt Collection Practices Act ("the FDCPA"), the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("Pennsylvania UTPCPL"), and the Pensylvania Debt Collection Trade Practices Regulations ("Pennsylvania Regulations"). Before the Court is Defendants' Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(c). The matter has been fully briefed and is ripe for decision. For the reasons explained below, the Court grants in part and denies in part Defendants' Motion.

I. BACKGROUND

Plaintiffs are Mattea Wenrich ("Mattea") and her parents Whalen and Vicky Wenrich ("Parents"). Defendants are Robert E. Cole and Robert E. Cole, P.C., a law firm (collectively, "Defendants" or "Cole"). Plaintiffs allege that Charles and Rosemary Swanson ("the Swansons") hired Defendants to collect a debt incurred when the Swansons allegedly paid to repair alleged

damages relating to a tenancy. Compl. ¶ 8. Plaintiffs allege that Defendants violated the FDCPA, the Pennsylvania UTPCPL and the Pennsylvania Regulations in two letters that Cole sent on May 21, 1999, one to Mattea and one to Parents, and in one telephone call made on Sept. 16, 1999.

The letters are exhibits to the Complaint. The letter to Mattea stated that it was a formal notice that her security deposit of $550 had been used due to extreme damage to the premises upon her vacating. Compl. Ex. B. The letter stated that she failed to maintain the premises in clean and sanitary condition as required by the lease, and that the letter constituted a demand for the outstanding balance of $6,424.90 that the Swansons spent to repair damages, plus attorney's fees of $200. Id. The letter asked Mattea to remit a check payable to the Swansons within ten days, and stated that failure would result in the filing of a landlord and tenant complaint in Municipal Court of Philadelphia County. Id. The letter stated that according to the lease, the Swansons would recover in court the amounts demanded, plus filing fees, attorney's fees and interest. Id.

The letter to Parents stated that Cole "under[stood] that [Parents] guaranteed the lease agreement" of Mattea, enclosed a copy of the correspondence to Mattea, and stated, "As guarantor for Mattea's lease, you are responsible with her to pay." Compl. Ex. A. The letter asked for a response within ten days and stated that the alternative was the filing of a complaint in Municipal Court in Philadelphia. Id.

Cole does not dispute that Parents did not guarantee their daughter's lease obligations. Cole alleges that the Swansons told him that the Parents had executed a guarantee, and that Cole later told Plaintiffs' counsel that there was no valid guarantee, and no suit would be filed against the Parents. Def. Mot. ¶¶10, 14.

Plaintiffs allege damages as follows: injury to reputation, damage to their credit, out-of-

pocket expenses, physical, emotional and mental pain and anguish and pecuniary loss. Plaintiffs allege they will continue to suffer the same damages for an indefinite time in the future.

II. DISCUSSION

A. Legal Standard

A claim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) only if the plaintiff can prove no set of facts in support of the claim that would entitle him or her to relief. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The court must consider only those facts alleged in the complaint and accept all of the allegations as true. Id.; see also Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989) (holding that in deciding a motion to dismiss for failure to state a claim, the court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the nonmoving party"). In reviewing a complaint, a court considers not only the allegations contained in the complaint itself but also the exhibits attached to it. ALA, Inc., 29 F.3d at 859. See Fed. R. Civ. P. 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.").

Rule 12(c) provides that a motion for judgment on the pleadings may be made "[a]fter the pleadings are closed." Fed. R. Civ. P. 12(c). Here, Defendants have not filed an answer; therefore, Defendants' motions based on 12(c) are premature. This flaw is without consequence, because Defendants' motions pursuant to Rule 12(c) were also made pursuant to Rule 12(b)(6).

B. Defendants' Grounds

1. Non-Applicability of the FDCPA

Defendants argue that Plaintiffs have failed to state a claim under the FDCPA because "[t]he instant matter does not involve the offer or extension of credit to a consumer," and Plaintiffs have

not so asserted. Def. Mot. ¶¶ 26-28. Defendants argue that the United States Court of Appeals for the Third Circuit in Zimmerman v. HBO Affiliate Group, 834 F.2d 1163 (3d Cir. 1987) has construed the FDCPA to apply only to debts arising from transactions involving an offer or extension of credit. In Zimmerman the court stated:

> We find that the type of transaction which may give rise to a 'debt' as defined in the FDCPA, is the same type of transaction as is dealt with in all other subchapters of the Consumer Credit Protection Act, i.e., one involving the offer or extension of credit to a consumer.

Zimmerman, 834 F.2d at 1168.

A later decision by the Third Circuit clarified Zimmerman. In Pollice v. Nat'l Tax Funding, 225 F.3d 379 (3d Cir. 2000), the court characterized the Zimmerman statement as dictum and noted that it "has been widely disavowed by several other courts of appeals." Pollice, 225 F.3d at 401. The court in Pollice stated: "In our view, the plain meaning of section 1692a(5) indicates that a 'debt' is created whenever a consumer is obligated to pay money as a result of a transaction whose subject is primarily for personal, family or household purposes. No 'offer or extension of credit' is required." Id. As Pollice makes clear, the Third Circuit does not limit the FDCPA's scope to transactions involving an offer or extension of credit.

Pollice and the FDCPA do, however, require that the debt underlying an FDCPA action "arise[] out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C.A. § 1692a(5) (West 1998). Plaintiffs' Complaint does not allege that the tenancy out of which Plaintiffs' alleged obligation to pay arises was "primarily for personal, family or household purposes"; however, both Defendants' Motion to Dismiss and Plaintiffs' Response allege that the

lease was residential. Def. Mot. ¶ 6; Pl. Resp. ¶ 26. There being no dispute that the lease giving rise to the alleged debt was residential, the Court concludes that the nature of the transaction underlying the action does not bar applicability of the FDCPA. Defendants' Motion to Dismiss on the ground that the instant matter does not involve the offer or extension of credit is denied.

2. Parents' Cause of Action

Defendants argue that the FDCPA does not apply to Parents because: They are not parties to the lease, Def. Mot. ¶ 30; they are not guarantors of obligations under the lease, Def. Mot. ¶ 31; any monies owed as a result of the lease can be owed only by Mattea, Def. Mot. ¶ 32; the FDCPA does not apply to guarantors, Def. Mot. ¶ 33; Parents are not debtors or consumers under the FDCPA, Def. Mot. ¶ 34; and defendants are not debt collectors as to Parents. Def. Mot. ¶ 35. Defendants' theory is that the FDCPA does not apply to persons who (1) are not obligated on a debt, or who (2) are guarantors. See Def. Mem. at 8, 9.

The grant of a cause of action under the FDCPA is given to "any person." 15 U.S.C.A. § 1692k(a) (West 1998) ("Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person."). Federal courts interpret Section 1692k(a) as a broad grant available to persons who are not obligated or allegedly obligated to pay the debt that the defendant sought to collect. See Whatley v. Universal Collection Bureau Inc. (Florida), 525 F. Supp. 1204, 1206 (N.D. Ga. 1981) (holding that not only the consumer, but his parents, who were not allegedly obligated on the debt, had standing to sue under the FDCPA). In that case, a debt collector allegedly left a threat on the answering machine at the family's home in an attempt to collect the consumer's debt to J.C. Penney Co. Inc. The court held that "'any person,' as used in 15 U.S.C. § 1692k(a) includes persons, such as [parents of the

consumer], who claim they are harmed by proscribed debt collection practices directed to the collection of another person's debt." Whatley, 525 F. Supp. at 1206. See also Wright v. Finance Service of Norwalk, Inc., 22 F.3d 647, 650 (6th Cir. 1994) (holding that executrix daughter of deceased had standing under FDCPA where daughter opened letters to her deceased mother that allegedly violated the FDCPA); Dutton v. Wolhar, 809 F. Supp. 1130, 1135 (D. Del. 1992) (holding that son who received letter regarding a debt incurred by his father, who had the same name but lived at a different address, could sue the debt collector); 17 Am. Jur. 2d. Consumer and Borrower Protection § 221 (West 1990) ("[T]he scope of the Act is not limited to consumers obligated or allegedly obligated to pay a debt, but includes any person allegedly harmed by proscribed debt collection practices directed towards the collection of another person's debt."). The legislative history of the statute supports extending the protection of the FDCPA to persons other than those obligated on a debt, who receive a communication from a debt collector:

> This bill also protects people who do not owe money at all. In the collector's zeal, collection efforts are often aimed at the wrong person either because of mistaken identity or mistaken facts. This bill will make collectors behave responsibly towards people with whom they deal. Another group of people who do not owe money, but who may be deliberately harassed are the family, employer and neighbors of the consumer. These people are also protected by . . . this bill. Certainly a person who has a common name and is being hounded by a debt collector because of the debts of another person deserves the protection this legislation will offer."

H.R. Rep. No. 95-131, at 8 (1977).

Under certain sections of the FDCPA, a plaintiff must be a "consumer" as defined in the FDCPA to have a cause of action because those sections define violations in terms of conduct directed toward a "consumer." See Wright, 22 F.3d at 649; Sibersky, 2000 WL 1448635, at *5 ("[C]ertain sections of the FDCPA are violated only by certain conduct toward a 'consumer.'"). The

FDCPA defines "consumer" as "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C.A. § 1692a(3) (West 1998). Sibersky involveddebt collection letters written only to a wife regarding an obligation on a lease signed only by her. Under New York law, the wife alone was bound by the lease. Id. at *5. The court held that the husband could sue for a violation of Section 1692e(5), but not for Sections 1692e(11) and 1692g because the latter two provisions regulate only conduct toward consumers. Id. ("Because Mr. Sibersky is not a consumer, he is not a person as to whom the debt collector failed to comply with a provision of the FDCPA and he is therefore not a person as to whom the defendants could be liable for a violation of those sections."). See also Conboy v. AT & T Corp., 84 F. Supp. 2d 492, 504, 505 (S.D.N.Y. 2000).

Under the cases cited above, Plaintiffs are persons who allege that they were harmed by Defendants' proscribed debt collection practices with respect to them. Therefore, Parents at least have a cause of action under those provisions of the FDCPA that do not regulate conduct only with respect to consumers: 15 U.S.C. §§ 1692e, 1692e(2)(A), 1692e(5), 1692e(10) and 1692f. To state claims under Sections 1692e(11) and 1692g, Parents must be "consumers." Defendants argue that Parents are not "consumers" under the FDCPA. Def. Mot. ¶ 34. Parents expressly allege that they are "consumers." Compl. ¶ 25. Parents allege that Defendants sent them a letter stating that, as guarantors of their daughter's lease, they were "responsible with her to pay." Compl. ¶ 9, Ex. A. Parents have alleged facts that, if true, establish that they are natural persons "allegedly obligated to pay any debt." 15 U.S.C.A. § 1692a(3) (West 1998). Therefore, Parents have sufficiently alleged that they are "consumers" as necessary to state a claim under Sections 1692e(11) and 1692g. Accordingly, the Court denies Defendants' Motion to Dismiss as to Parents on the ground that Parents are not obligated on the underlying debt.

Next Defendants contend that the FDCPA does not apply to guarantors. Contrary to Defendants' argument, federal courts have not construed the FDCPA to deny protection to guarantors. The cases that Defendants cite in support of this argument are inapposite. Defendants' Memorandum quotes an Eastern District of Pennsylvania case stating: "The FDCPA is inapplicable to an obligation to pay money arising from a guaranty agreement," Dolente v. McKenna, No. CIV.A.95-7142, 1997 WL 117001, *3 (E.D. Pa. March 11, 1997); however, that statement appears to paraphrase somewhat imprecisely the Fifth Circuit case it cites (discussed below). Dolente involved a limited partner who received a distribution from the sale of the partnership's only asset, a nursing home. Later, the partnership sued the limited partner to recover the distribution pursuant to an indemnification agreement. The limited partner plaintiff argued that the distribution was a loan for personal, family or household purposes. Id. at *2. The court rejected the argument that the distribution was a loan, and concluded that the indemnification obligation was not a debt under the FDCPA.

The Dolente court's statement that the FDCPA is inapplicable to an obligation to pay money arising from a guaranty agreement cited First Gibraltar Bank, FSB, v. Smith, 62 F.3d 133, 135, 136 (5th Cir. 1995). In that case, the plaintiff entered a limited partnership that formed to acquire and develop apartments. Id. at 134. The plaintiff executed a guaranty of a $10 million loan to the partnership, the partnership defaulted, and a Texas court entered summary judgment on the guaranty in favor of a purchaser of the defaulted loan. Id. The plaintiff counterclaimed violation of the FDCPA and Texas debt collection law. After removal to federal court, the district court dismissed the FDCPA and Texas law counterclaims on the ground that both laws were inapplicable. Id. at 134, 135. The Fifth Circuit affirmed, stating:

> We find that, on its face, the language of the [FDCPA] does not include [the purchaser of the loan] because it is not collecting a 'debt' for itself or another, but rather, is attempting to enforce an obligation under a guaranty agreement in connection with a commercial transaction. The district court concluded that the transaction, including the partnership's purchase of real estate, was commercial, not for personal or household purposes. . . . Because the guaranty agreement was not personal in nature, it does not constitute a debt as defined by the federal statute.

Id. at 135-36 (emphasis added). Clearly, the Fifth Circuit found the FDCPA inapplicable on the basis of the commercial nature of the transaction, not upon the plaintiff's status as a guarantor. Therefore, the Court denies Defendants' Motion to Dismiss as to Parents on the ground that the FDCPA does not apply to guarantors.

3. Punitive Damages

Defendants argue that punitive damages are not authorized by the FDCPA, and punitive damages under the Pennsylvania UTPCPL are available only where violations are repeated or extreme. Def. Mot. ¶¶ 37-48. Plaintiffs in their Response state that they "have withdrawn their demand for punitive damages in this case." Pl. Resp. ¶¶ 38-48. The Court grants Defendants' Motion to strike as uncontested.

4. Emotional Distress

Defendants move to dismiss the "Emotional Distress Damages claim," arguing that Plaintiffs have failed to allege outrageous conduct or "any treatment" to support a claim for intentional infliction of emotional distress. Def. Mot. ¶¶ 52, 53. Defendants further argue that Plaintiffs failed to allege physical injury to a close family member or zone of danger impact sufficient to support a claim for negligent infliction of emotional distress. Def. Mot. ¶ 54. Plaintiffs respond that they have not pled or asserted any cause of action against Defendants for either intentional or negligent infliction of emotional distress. Resp. ¶¶ 52-55. Plaintiffs assert that furthermore, the FDCPA and

Pennsylvania law provide actual damages for emotional distress arising from unlawful debt collection practices, and that they need not prove the common law elements of intentional or negligent infliction of emotional distress to be entitled to damages for emotional distress. Pl. Resp. ¶ 52.

Plaintiffs are correct that the FDCPA provides damages for emotional distress, and that a plaintiff need not prove the elements of the Pennsylvania torts of intentional or negligent infliction of emotional distress. See the well reasoned analysis examining cases within the Third Circuit and comparing the FDCPA to the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., contained in Smith v. Law Offices of Mitchell N. Kay, 124 B.R. 182, 188 (D. Del. 1991) (holding that "when a violation of the FDCPA has been established, actual damages for emotional distress can be proved independently of state law requirements. Congress did not limit the recovery of actual damages for emotional distress under the FDCPA . . . to those damages a plaintiff could have recovered under state law in a separate tort action for intentional or negligent infliction of emotional distress.").

Plaintiffs' assertion that "emotional and mental pain, suffering and anguish" are "actual damages" that are "injuries . . . cognizable under" the Pennsylvania Regulations, Pl. Resp. ¶¶ 52-55, is not clearly supported by the language of the Pennsylvania statute or cases interpreting it. A violation of the Pennsylvania regulations gives rise to a cause of action and remedy under the Pennsylvania UTPCPL as follows:

> Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a

> method, act or practice declared unlawful by section 3[1] of this act, may bring a private action to recover actual damages or one hundred dollars ($100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than one hundred dollars ($100), and may provide such additional relief as it deems necessary or proper. The court may award to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorney fees.
>
> 73 P.S.A. § 201-9.2(a) (West 2000) (emphasis added).

The Pennsylvania Supreme Court has not addressed whether damages for emotional distress are available under the Pennsylvania UTPCPL. Judicial interpretations suggest that the answer would be no. See McCauslin v. Reliance Finance Co., 751 A.2d 683, 685 (Pa. Super. Ct. 2000). The issue rose in the context of an appeal from an award of attorney's fees. The plaintiff, a debtor on a car loan, sued for violation of the Pennsylvania UTPCPL, intentional infliction of emotional distress and punitive damages. McCauslin, 751 A.2d at 684. Only the Pennsylvania UTPCPL claim went to trial, and the jury awarded plaintiff $5,000 in actual damages. Id. at 685. Plaintiff filed a post-trial motion seeking an additional award of treble damages and interest, attorney's fees and costs. Id. The court denied treble damages and awarded interests, costs and attorney's fees of $12,000. Id. The Superior Court noted that the trial court "appear[ed] to acknowledge that some of the attorney's time was likely spent on matters other than the UTPCPL counts, including an action for intentional infliction of emotional distress and a plea for punitive damages." Id. The Superior Court vacated and remanded the matter, reasoning:

> [T]he general rule is that attorney's fees are not recoverable and recovery is strictly by a grant of statutory authority to that effect. Here the statutory authority comes

[1]Section 3 provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce as defined by subclauses (i) through (xxi) of clause (4) of section 2 of this act and regulations promulgated under section 3.1 of this act are hereby declared unlawful." 73 P.S.A. § 201-3 (West Supp. 2000). The Pennsylvania Regulations are promulgated pursuant to Section 3.1 of the Pennsylvania UTPCPL. 37 Pa. Code § 303 (West 2000).

> from 73 P.S.A. § 201-9.2, under the [Pennsylvania UTPCPL]. The Act does not specifically confer the right to recover damages for infliction of emotional distress, nor are there reported decisions recognizing such a recovery. Further, although the Act does allow the Court to impose up to treble damages for actual damage sustained, it does not otherwise confer a right to punitive damages. As such, we can see no statutory authority for awarding attorney's fees for time spent pursuing these counts. Consequently, we believe this fact should have been given consideration, yet apparently was not."

Id. See also Krisa v. Equitable Life Assurance Society, 113 F. Supp. 2d 694, 707 (M.D. Pa. 2000) ("Because the statute requires an ascertainable loss of money or property and limits recovery to 'actual damages,' [plaintiff] will not be entitled to recover emotional distress type damages."); Nelson v. First Card, No. CIV.A.97-3503, 1998 WL 107236, at *2 (E.D. Pa. 1998) ("[R]ecovery for emotional distress is not permitted under the UTPCPL."); Bryant v. Woodland, 111 B.R. 474, 480 (E.D. Pa. 1990) ("Recovery for emotional distress is not permitted under the Pennsylvania [UTPCPL], as it does not fall within the express limitations of the statute which recognizes as actual damages 'any ascertainable loss of money or property . . .'").

Plaintiffs cite Belile v. Allied Medical Accounts Control Associated Bureaus, Inc., 209 B.R. 658 (Bankr. E.D. Pa. 1997) for the proposition that the Pennsylvania UTPCPL provides a remedy for emotional injury. Pl. Resp. ¶ 52. In that case, the debtor "presented evidence of modest actual damages, in the nature of emotional distress arising from receipt of the letters in issue." Belile, 209 B.R. at 664. The court interpreted the Pennsylvania UTPCPL to "mandate[] that at least $100 be awarded for any violation of the [Pennsylvania Regulations]," Belile, 209 B.R. at 665, and trebled the minimum to award the debtor $300. Id. at 665. A bankruptcy court's decision is not binding authority for this Court. The Superior Court's discussion in McCauslin recognized that the Pennsylvania UTPCPL "does not specifically confer the right to recover damages for infliction of

emotional distress" and resolved the ambiguity in favor of barring recovery of attorney fees for time spent in pursuit of a claim for intentional infliction of emotional distress. The facts of McCauslin are not directly analogous to the instant case; in McCauslin, the plaintiff brought a distinct claim for the tort of intentional infliction of emotional distress, where Plaintiffs here assert emotional damage as actual damage caused by violation of the Pennsylvania UTPCPL and Pennsylvania Regulations. Compl. ¶ g.[2] Nevertheless, the Superior Court's discussion of the act and interpretations by other federal district courts guide this Court to predict that the Pennsylvania Supreme Court would hold that "actual damages" under the Pennsylvania UTPCPL exclude emotional distress damages.

Defendants' Motion to Dismiss the "Emotional Distress Damages claim" is denied, as Plaintiffs have asserted no such cause of action. Should Plaintiffs prove emotional distress damages, they may be entitled to recover under the FDCPA, but may not seek recovery for emotional distress damages under the Pennsylvania UTPCPL.

5. Negligence

Defendants move to dismiss the "Negligence/Bodily Injury Damages claim" on several grounds, including that the Pennsylvania privity rule provides that attorneys are liable for negligence only to their clients. Def. Mot. ¶¶ 56-59. Plaintiffs respond that they have not claimed any cause of action for negligence, and have only claimed actual damages under the FDCPA and the Pennsylvania Regulations, which recognize mental and physical injury as cognizable damages. Pl. Resp. ¶¶ 58, 59. Defendants' Motion to dismiss "Negligence/Bodily Injury Damages claim" is denied, as Plaintiffs have asserted no such cause of action. The Court repeats the caveat that Plaintiffs may not seek damages for emotional distress under the Pennsylvania UTPCPL.

[2]The twenty-second paragraph of the Complaint is erroneously labeled Paragraph "(g)."

6. Jurisdiction of Pendant Claim

Defendants argue that Plaintiffs' pendant state law claim should be dismissed upon dismissal of the FDCPA claim. Def. Mot. ¶¶ 60-65. Defendants' Motion to dismiss the pendant state law claim is denied, as the Court has not dismissed Plaintiffs' federal claim.

III. CONCLUSION

For the foregoing reasons, the Court grants Defendants' motion to strike Plaintiffs' claim for punitive damages and otherwise denies Defendants' Motion to Dismiss. An appropriate Order follows.